SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION
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November 2, 1970

TO: All Commissioners
FROM: Joseph E. Bodovitz, Executive Director

SUBJECT: POSSIBLE COURSES OF ACTION IN LIGHT OF ATTORNEY GENERAL'S OPINION ON "RULE OF EQUIVALENCIES"
(For Commission consideration on November 5, 1970)

Introduction

On October 15, 1970, Attorney General Thomas C. Lynch said in a formal opinion (which was prepared by Deputy E. Clement Shute) that (1) the law requires all further filling of the Bay to be for water-oriented purposes, and (2) the Commission does not have the legal power to adopt a "rule of equivalencies," under which non-water-oriented fills could be allowed, even if the new Bay filling were offset by removal from the Bay of an equivalent amount of existing material, so that there would be no decrease in the size of the Bay.

Following discussion of the Attorney General's ruling at the October 15 Commission meeting, the staff was directed to prepare a memorandum for the Commission on two points:

1. What is "water-oriented?" Or, more precisely, what are water-oriented uses for which the Commission may legally authorize Bay filling?

2. What alternative courses of action exist as a result of the Attorney General's opinion?

The purpose of this memorandum is to provide answers to these questions, particularly in light of (1) the discussion before the Commission during recent weeks on the proposed "rule of equivalencies," (2) plans for San Francisco's northern waterfront, and (3) the public hearings on the Ferry Port Plaza permit application. (The postponement of the voting on the Ferry Port Plaza application is intended to allow time for the Commission to try to establish a general course of action before deciding on a specific permit application.)

Background

During 1968, when the Bay Plan was being completed, and also during 1969, when the Commission's recommendations for legislation were being considered in Sacramento, specific development proposals for the San Francisco waterfront had not been completed. Nor had specific proposals been made for development of other areas around the Bay, such as the Encinal Terminal property in the City of Alameda, where dilapidated and obsolete piers, pile-supported platforms, and other structures inhibit public access to the Bay and present an unsightly appearance.

It was assumed by the staff, and by others, that the Commission could deal with proposals for such areas by adopting necessary administrative regulations (the Commission was authorized by the 1969 law to adopt regulations to define operating procedures and to clarify provisions of the law and the Bay Plan).

Accordingly, the staff proposed earlier this year that a "rule of equivalencies" be considered as one in a lengthy series of draft administrative regulations. This proposed rule (Section 10445 of the draft regulations) would have been applicable to several areas around the Bay, including the northern waterfront of San Francisco and the Encinal property in Alameda. It would have authorized non-water-related fills, provided that for each such fill, an equivalent amount of existing material would be removed from the Bay; "equivalency" projects would thus not reduce the size of the Bay in any way. The reasoning was that such projects would provide new public access to the Bay, and would improve the appearance of unsightly areas, through privately-financed new construction, without damage to the Bay.

Soon after this proposal was submitted for public hearing along with the other draft regulations, however, the "rule of equivalencies" was challenged as to both its wisdom and its legality. Opponents argued that non-water-related projects should not be allowed on fill under any circumstances, in part because they believed that the proposed safeguards would prove inadequate and the way would soon be opened for virtually unrestricted Bay filling; opponents also argued that the first example of a project to which a "rule of equivalencies" would apply, the Ferry Port Plaza project, would not involve a true equivalency because the piers and cargo-handling sheds to be removed from the Bay would be replaced by a complex of retail shops, office space, and a hotel, which would be taller and would extend farther into the Bay.

The legal challenges questioned the Commission's authority to adopt a "rule of equivalencies." Accordingly, the Commission asked its legal advisor, the State Attorney General, for an opinion as to the legality of the proposed regulation; no further hearings on this draft regulation were held, and no further action was taken on it.

Meanwhile, the Ferry Port Plaza project had been approved by San Francisco officials, and an application for a permit was submitted to the Commission. Chairman Lane then asked the Port of San Francisco to outline its waterfront plans to the Commission, so the Ferry Port Plaza application could be considered in the context of these plans; Miriam Wolff, port director, did so in a presentation to the Commission on September 3, 1970.

Concurrently with these developments, a vigorous public debate was (and is) taking place in San Francisco over height limits and other aspects of a proposed U. S. Steel complex in the Bay south of the Ferry Building; this project became confused at times with the Ferry Port Plaza project north of the Ferry Building.

In addition, there appeared to be some confusion over the different responsibilities of a local government (in this case, San Francisco) and the Commission. The Commission's primary concern is with standards and policies applicable to the entire Bay and shoreline; for example, the law and the Bay Plan require the

Commission to be concerned with protecting and enhancing views of the Bay, through appropriate arrangement and height of new developments; but neither the law nor the Bay Plan establish specific or detailed height limits for any shoreline area.

One final point of background: during discussions about the San Francisco waterfront over the past several months, increasing public attention has been given to the provisions of the Burton Act (Chapter 1333, Statutes of 1968), the law by which the Port of San Francisco was transferred from State control to San Francisco control.

Two aspects of the Burton Act may at least contribute to pressures for fill on the San Francisco waterfront: the first is a requirement that San Francisco not only assume from the State the existing debt of the Port (almost $60 million) but also that San Francisco spend another $100 million on maritime development within the next 25 years, or the Port is to revert to State ownership; and the second is that, subject to the provisions of other State law (such as the McAteer-Petris Act), the San Francisco Port Commission may use State-owned parts of the Bay for commercial development (or, indeed, any other kind of development) that the Port Commission finds will yield "maximum profit," which is to be used for maritime development elsewhere on the San Francisco waterfront.

Attorney General's Opinion

The Attorney General's October 15 opinion was summarized as follows:

"MELVIN B. LANE, CHAIRMAN OF THE SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION, has requested our opinion on the following question:

Does the Commission have authority to adopt a regulation (and issue permits pursuant thereto) which would allow Bay fill for non-water-oriented uses if the applicant creates as much new Bay surface as would be removed by the fill and the Commission determines that the proposed use of the new fill would not adversely affect the public's enjoyment of the Bay?

"The conclusion is:

In light of the legislative directive, with the exceptions noted in this opinion, that further filling of San Francisco Bay be limited to fills for water-oriented uses, it is our conclusion that such a rule would be contrary to the Commission's enabling legislation and therefore invalid. Pursuant to this conclusion, it follows that permits may not be granted by the Commission for projects which would employ the concept of 'replacement fills.'"

(The exceptions referred to empower the Commission to grant permits for minor filling to improve public access to the Bay and to enhance shoreline appearance.)

What is "Water-Oriented?"

As used in both the law or the Commission's Bay Plan, the phrases "water-oriented" (or "water-related" or "Bay-related") have a special meaning: they refer to particular uses of property that must be on or near the water and that may justify some Bay filling if they cannot reasonably be located entirely on existing land.

In a sense, the Commission's planning program had as its primary objective a determination as to which of the many potential competing uses of the Bay justified further filling and which did not. The Commission thus made clear in the Bay Plan that while water-related recreation and water-related industry may justify filling, not all recreation and not all industry are water related.

Recreation. Bay Plan Recreation Policy 5(a)2 provides that "To capitalize on the attractiveness of their Bayfront location, parks should emphasize hiking, bicycling, riding trails, picnic facilities, view points, beaches, and fishing facilities. Recreational facilities that do not need a waterfront location, e.g., golf courses and playing fields, should generally be placed inland, but may be permitted in shoreline areas [i.e., not on fill] if they are part of a park complex that is primarily devoted to water-oriented uses (emphasis added)."

Industry. The Bay Plan policies on water-related industry distinguish between water-related industries (those that require "frontage on navigable waters to receive raw materials and to distribute processed materials by ship"); water-using industries (those that need to have "large volumes of water for cooling and therefore seek sites near the Bay"); and linked industries (those "that supply or use the products of water-related industries and therefore seek locations near them").

In addition, both the law and the Bay Plan provide that, subject to specific conditions, filling can be allowed for Bay-oriented commercial recreation and public assembly--defined in the Bay Plan (p. 36) as "facilities specifically designed to attract large numbers of people to enjoy the Bay and its shoreline, such as restaurants, specialty shops, and hotels." (The Bay Plan provides that (1) filling for such purposes must, among other things, be on privately-owned parts of the Bay, and that (2) a substantial portion of the project must be on existing land.)

The 1969 amendments to the McAteer-Petris Act reflect the same concept of limitations on the definition of water-related. Government Code Section 66605 provides in part as follows:

> (a) That further filling of San Francisco Bay should be authorized only when public benefits from fill clearly exceed public detriment from the loss of the water areas and should be limited to water-oriented uses (such as ports, water-related industry, airports, bridges, wildlife refuges, water-oriented recreation and public assembly, water intake and discharge lines for desalinization plants and power generating plants requiring large amounts of water for cooling purposes) or minor fill for improving shoreline appearance or public access to the bay;
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> (b) That fill in the bay for any purpose, should be authorized only when no alternative upland location is available for such purpose; (Emphasis added.)

As Mr. Shute pointed out during the October 15 discussion of the opinion on equivalencies, the examples cited in Section 66605 of the Government Code are both "illustrative and limiting." Although the "such as" clause in Section 66605(a)

does not list every possible water-oriented use for which the Commission could allow fill, and although the law allows the Commission some leeway to define terms by regulation and to add to the list by Plan amendment, the statute does set strict limits on the uses the Commission could legally classify as water-oriented: such uses would have to be similar to the specific uses already mentioned in the statute. The Commission can thus amend the Bay Plan, but only the Legislature and the Governor can change the law under which the Commission operates.

Within the meaning of the law and the Bay Plan, therefore, a proposed project clearly cannot be called water-oriented--and thus entitled to Bay fill--simply because it provides windows affording a view of the Bay to its occupants. Otherwise, the Bay could be filled for office buildings, apartment houses, warehouses, bakeries, automobile showrooms, department stores, supermarkets, and almost every other conceivable use of property, subject only to a requirement that they provide windows facing the water. Such a definition would be completely contrary to the findings of the McAteer-Petris Act that "uncoordinated, haphazard filling in San Francisco Bay threatens the Bay itself and is therefore inimical to the welfare of both present and future residents of the area surrounding the Bay; (Government Code Section 66601)"

Possible Courses of Action

In the view of the staff, there are three general courses of action that are open to the Commission in light of the Attorney General's opinion:

1. Make No Change in the Present Situation. The effect of this alternative on areas such as the San Francisco northern waterfront and the Encinal area in Alameda would be as follows: (a) the existing obsolete piers and pile-supported platforms could be remodeled for almost any use provided public access to the Bay was included as part of any substantial renovation project, and provided that installation of new pilings or other fill was not required (piers and pile-supported platforms are defined as fill in the law); and (b) if the obsolete piers and pile-supported platforms were to be replaced, any new filling, including new piers and platforms, would have to be for water-oriented purposes as defined in the law (i.e., shipping, water-related industry, etc.) with one important exception: filling for water-oriented commercial recreation could not be allowed on publicly-owned areas such as the San Francisco waterfront, because the Bay Plan limits such construction to privately-owned parts of the Bay. With regard to San Francisco, either the present pile-supported platforms and cargo sheds would be renovated for various uses without the placement of new pilings, and there is debate as to whether or not this could economically be done, or under this alternative there would be little or no substantial new development, and the present condition of the waterfront would continue.

2. Amend the Bay Plan. Under this alternative, the Bay Plan would be amended to allow filling for water-oriented commercial recreation on both privately-owned and publicly-owned parts of the Bay. If this alternative is pursued, the staff believes consideration should be given to an amendment requiring that filling for water-oriented commercial recreation anywhere in the Bay be either part of a project that is substantially on existing land or a project that meets a "water-oriented rule of equivalencies."

At present, the Bay Plan allows filling for water-oriented commercial recreation and public assembly only on privately-owned parts of the Bay, in part as an incentive to private owners to provide new public access to the Bay and to improve shoreline appearance, and in part to provide private owners with an economic use of their property. It would be within the Commission's legal power to amend the Bay Plan to provide for fills for this purpose on publicly-owned parts of the Bay too. Such an amendment would affect development on the northern waterfront of San Francisco which, like many other parts of the Bay, is a water area owned by the State but granted in trust to a municipality.

The amendment suggested in this alternative could provide that any project involving fills for water-oriented commercial recreation should be required to meet one of the following two standards:

A substantial portion of the project would be built on existing land, or

The project would meet a "water-oriented rule of equivalencies," i.e., the surface area of the new fill for water-oriented commercial recreation and public assembly could not exceed in size the surface area of the existing material being removed from the Bay. And the type of fill being put into the Bay would be equivalent to the type being removed (i.e., if pile-supported platforms were being removed from the Bay, then pile-supported platforms--but not dirt or other solid fill--could be used for the replacement project), except that if solid material were being removed from the Bay, through dredging or opening of dikes, then the replacement project could include pile-supported platforms or solid fill or both.

The staff believes that the following conditions should be considered by the Commission for projects under a "water-oriented rule of equivalencies:"

a. General Area. The material being removed from the Bay would have to be in the same general area as the new fill for water-oriented commercial recreation, and not at a widely-separated part of the Bay.

b. Extent. The new fill for water-oriented commercial recreation could extend no farther into the Bay than the material being removed, or, alternatively, could extend no farther than any nearby piers or promontories.

c. No Harmful Effect on Bay. The overall project--new fill plus removal of existing material--should result in no net damage to water quality, fish and wildlife, or any other natural resource values of the Bay. If the new fill involves pile-supported platforms, the placement and size of the new pilings should result in a net improvement in water flow as compared to the effects caused by the material being removed.

d. Area Plan. The project should be consistent with plans for the area in which it is proposed.

e. Consistency with Grant Provisions. If a project under these criteria is proposed for State-granted parts of the Bay, the project should obviously be consistent with terms of the State grant.

3. Seek a Change in Law to Allow Filling for Non-Water-Related Uses. If the Commission wishes to allow filling under a "rule of equivalencies" for non-water-related uses, this would have to be referred to the Legislature. Making an exception to present law to allow filling for non-water-related uses would require a change in the McAteer-Petris Act.

It is conceivable that any of the three general courses of action listed above (including the first, which would make no change in the present situation) could result in a lawsuit. In the view of the staff, there would appear to be little basis for such a lawsuit; but if one were brought, the staff believes that several years would elapse before a final decision were reached, assuming, as the staff does, that appeals would be taken from any lower court decision. Therefore, the staff believes that the possibility of a lawsuit should not affect either the content or the timing of the Commission's decision on the three general alternatives.

Staff Recommendation

The staff recommends that the Commission schedule a public hearing, as required by law, on a Bay Plan amendment to carry out Alternative 2.

Under the law and the Bay Plan, a proposed Plan amendment cannot be voted on by the Commission until at least 90 days have elapsed from the first notice of a public hearing on the proposal; and the affirmative vote of 2/3 of the members of the Commission is needed to adopt a Plan amendment.

The Commission's legal counsel has advised that the draft of a possible Bay Plan amendment must be prepared before the legal notice of the public hearing can be published. A draft of a possible Plan amendment, which would carry out the proposals in Alternative 2, is now being prepared and will be available for Commission consideration on November 5.

The staff recommends that the 90-day period for consideration of a Plan amendment be started now, with action at the November 5 meeting to schedule a public hearing about 60 days from now, at the Commission meeting of January 7, 1971. The public hearings would be held before the 90 days had elapsed, and the Commission would be able to vote, having held the required public hearings, 90 days after the notice of hearing.

The staff wishes to add one final point, however: in recommending that the hearing be held, the staff is not necessarily recommending that a Plan amendment be adopted. Only after public hearings and discussion can an intelligent recommendation be made; one of the great strengths of the Commission's Bay Plan is that there was extensive public participation in its preparation; there should be the same public participation in consideration of any proposals for change.